

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
Assigned on Briefs June 6, 2023

FILED

06/12/2023

Clerk of the  
Appellate Courts

**STATE OF TENNESSEE v. DARYL BOBO**

**Appeal from the Criminal Court for Shelby County**  
**No. 11-03987      Chris Craft, Judge**

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**No. W2022-01567-CCA-R3-CD**

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The defendant appeals from the Shelby County Criminal Court's denial of his motion seeking resentencing pursuant to Tennessee Code Annotated section 39-17-432(h). Upon our review of the applicable law and the briefs of the parties, we conclude the defendant does not have an appeal as of right and the instant appeal should be dismissed.

**Tenn. R. App. P. 3 Appeal; Appeal Dismissed**

J. ROSS DYER, J., delivered the opinion of the court, in which JOHN W. CAMPBELL, SR., and TOM GREENHOLTZ, JJ., joined.

Barry W. Kuhn, Assistant Public Defender, Memphis, Tennessee, for the appellant, Daryl Bobo.

Jonathan Skrmetti, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Karen Cook, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

***Facts and Procedural History***

The defendant was convicted in 2013 of possession with intent to sell 0.5 grams or more of cocaine in a drug-free school zone, a Class A felony, and possession with intent to sell 0.5 ounces or more of marijuana in a drug-free school zone, a Class D felony. The trial court sentenced the defendant as a Range III, persistent offender to sixty years for his cocaine conviction and twelve years for his marijuana conviction, to be served concurrently. A panel of this Court affirmed the defendant's convictions on direct appeal,

and our supreme court declined to review that decision. *State v. Daryl Bobo*, No. W2013-02008-CCA-R3-CD, 2014 WL 3954066, at \*1 (Tenn. Crim. App. Aug. 13, 2014), *perm app. denied* (Tenn. Dec. 19, 2014). In 2015, the defendant sought post-conviction relief, contending that his trial counsel was ineffective. The post-conviction court denied relief, and this Court affirmed. *Daryl Bobo v. State*, No. W2016-00477-CCA-R3-PC, 2016 WL 6803176, at \*5 (Tenn. Crim. App. Nov. 16, 2016), *perm app. denied* (Tenn. Feb. 28, 2017).

On June 14, 2022, the defendant filed a “Motion for Relief Pursuant to Public Chapter 927” seeking resentencing pursuant to the recent amendment to the Drug-Free School Zone Act (“the Act”). Tenn. Code Ann. § 39-17-432(h) (2022). A hearing was held on September 30, 2022, in the Criminal Court for Shelby County. At the hearing, the defendant testified that he had served over twelve years of his sixty-year sentence. He also stated that he currently works in the prison kitchen and is “partially blind” due to glaucoma. In support of his request for resentencing, the defendant presented the trial court with a form letter addressed to the trial court signed by twenty-three employees from the Morgan County Correctional Center, including the warden, “giving [the defendant] a good report.” Despite his “good report,” the defendant admitted he has been written up several times while incarcerated for violations such as larceny in 2015, possession of a deadly weapon in 2016, possession of tobacco products in 2017, possession/selling/use of drugs in 2020, and possession/selling/use of drugs in 2021. The State objected to the defendant’s request for resentencing but did not present any proof at the hearing.

At the conclusion of the proof, the trial court denied the defendant’s motion. In support of its decision, the trial court noted that in accordance with the statute, the court was to review the defendant’s criminal history. In doing so, the trial court noted that the defendant “has spent his entire life being a drug dealer. He’s been preying on our community.” The trial court went on to note that the defendant has “a horrible criminal record. I maxed his sentence out because of that originally.” Next, the trial court addressed the defendant’s behavior while incarcerated. More specifically, the trial court referenced the defendant’s numerous violations, noting the defendant was written up in

2015, [for] larceny. This was while he was in custody. 2016, possession of a deadly weapon while he was in custody, serving his sentence. 2017, possession of tobacco products. They restricted and gave him six months restriction. They took away three months of his visitation and a written reprimand. 2019, verbal reprimand for being out of place.

But more seriously within the last two years, August 27, 2020, possession, selling, and use of drugs. Now this is -- even though I gave him 60 years for possession of drugs and selling drugs, he’s still possessing them ten years into his sentence. Of course, he was in custody at the time so they gave him

20 days of punitive segregation and three months visitation suspension, three months of drug testing. But then in 2021, the next year, drugs possession, selling, use, guilty. Ten days punitive segregation, three months of visitation, three months of drug testing.

Finally, in support of its decision denying the defendant's request for resentencing, the trial court found that the defendant "will not [] stop selling drugs and committing drug crimes no matter what we do. His behavior while incarcerated has been absolutely horrible. . . . I don't find that he has been rehabilitated. I don't find any reason at all why his sentence needs to be reduced." The trial court entered a written order denying the defendant's request for resentencing on September 30, 2022. This appeal followed.

### *Analysis*

On appeal, the defendant, though not explaining how the trial court abused its discretion, argues the judgment of the trial court should be set aside and the case remanded for resentencing. The State, however, submits the defendant does not have an appeal as of right from the denial of his motion.<sup>1</sup> In the alternative, the State contends the trial court did not abuse its discretion in denying the motion. Upon our review of the record and the applicable law, we conclude the defendant does not have an appeal as of right from the denial of his motion, and therefore, the instant appeal is not properly before us and should be dismissed.<sup>2</sup>

In 2022, our legislature amended the Act creating a procedure allowing defendants to request resentencing in accordance with the 2020 revision of the Act. Tenn. Code Ann. § 39-17-432(h) (2022). More specifically, a defendant who was sentenced under the Act for an offense committed "prior to September 1, 2020, may, upon motion of the defendant or the district attorney general or the court's own motion" seek to be resentenced. *Id.* Upon the filing of such motion, the trial court shall hold a hearing to determine if the defendant would have received "a shorter period of confinement under this section if the defendant's offense had occurred on or after September 1, 2020." *Id.* "The court shall not resentence the defendant . . . if the court finds that resentencing the defendant would not be in the

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<sup>1</sup> In his principal brief, defendant asserts, without support, that "[t]he case is now before the Tennessee Court of Criminal Appeals as of right pursuant to Rule Three of the Tennessee Rules of Criminal Procedure." Despite the State's position that the defendant does not have an appeal as of right and that the instant matter should be dismissed, the defendant failed to file a reply brief addressing the same.

<sup>2</sup> Though we have determined that the defendant does not have an appeal as of right under Tenn. R. App. 3, we note that if we had reached the opposite result, the instant appeal is not timely. The trial court entered its order denying the defendant's motion on September 30, 2022; however, the defendant did not file his notice of appeal to this Court until November 7, 2022, and has not requested this Court waive the timeliness requirement.

interests of justice.” *Id.* In determining whether a new sentence would be in the interests of justice, the trial court may consider the defendant’s criminal record, his behavior since being incarcerated, the circumstances surrounding the defendant’s offense, and other factors that it deems relevant. *Id.* However, we note that despite granting the defendant an opportunity to seek resentencing in accordance with the amended statute, the legislature did not provide the defendant or the State with an avenue to appeal the trial court’s decision under the statute.

A defendant in a criminal case does not have an appeal as of right in every instance. *State v. Rowland*, 520 S.W.3d 542, 545 (Tenn. 2017) (“A defendant in a criminal case does not have an appeal as of right in every instance.”) Tennessee Rule of Appellate Procedure 3(b) provides when a defendant in a criminal case has an appeal as of right:

In criminal actions an appeal as of right by a defendant lies from any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) on a plea of not guilty; and (2) on a plea of guilty or nolo contendere, if the defendant entered into a plea agreement but explicitly reserved the right to appeal a certified question of law dispositive of the case pursuant to and in compliance with the requirements of Rule 37(b)(2)(A) or (D) of the Tennessee Rules of Criminal Procedure, or if the defendant seeks review of the sentence and there was no plea agreement concerning the sentence, or if the issues presented for review were not waived as a matter of law by the plea of guilty or nolo contendere and if such issues are apparent from the record of the proceedings already had. The defendant may also appeal as of right from an order denying or revoking probation; an order denying a motion for reduction of sentence pursuant to Rule 35(d), Tennessee Rules of Criminal Procedure; an order or judgment entered pursuant to Rule 36 or Rule 36.1, Tennessee Rules of Criminal Procedure, from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding, from a final order on a request for expunction, and from the denial of a motion to withdraw a guilty plea under Rule 32(f), Tennessee Rules of Criminal Procedure.

Tenn. R. App. P. 3(b).

Rule 3(b) does not specifically provide for an appeal as of right from an order denying resentencing pursuant to Tenn. Code Ann. § 39-17-432(h) (2022). A defendant in a criminal case has no appeal as of right unless it is enumerated in Rule 3(b). . *Rowland*, 520 S.W.3d at 545; *see also State v. Lane*, 254 S.W.3d 349, 353 (Tenn. 2008) (holding there is no appeal as of right from an order denying a defendant’s motion to modify a condition of probation); *Moody v. State*, 160 S.W.3d 512, 516 (Tenn. 2005) (holding the

defendant (in a case decided prior to the amendment of Rule 3(b) to allow for an appeal as of right for orders under Tennessee Rule of Criminal Procedure Rule 36) did not have an appeal as of right from the dismissal of a Rule 36 motion to correct an illegal sentence); *State v. James Frederick Hegel*, No. E2015-00953-CCA-R3-CO, 2016 WL 3078657, at \*1-2 (Tenn. Crim. App. May 23, 2016) (ruling the defendant had no right to appeal the denial of his motion to suspend court costs); *State v. Cedric Moses*, No. W2011-01448-CCA-R3-CD, 2011 WL 6916487, at \*1-2 (Tenn. Crim. App. Dec. 28, 2011) (holding the defendant did not have a Rule 3 appeal as of right from an order denying his motion to reinstate probation); *State v. Jay Bean*, No. M2009-02059-CCA-R3-CD, 2011 WL 917038, at \*2 (Tenn. Crim. App. Mar. 16, 2011) (holding a defendant has no right of appeal from an order denying his motion for a furlough); *State v. Childress*, 298 S.W.3d 184, 186 (Tenn. Crim. App. 2009) (holding a defendant cannot appeal from an order allowing the State to *nolle prosequi* the charges against him); *State v. Thomas Coggins*, No. M2008-00104-CCA-R3-CD, 2009 WL 482491, at \*3-4 (Tenn. Crim. App. Feb. 25, 2009) (ruling a defendant has no appeal as of right from an order denying a new probation revocation hearing); *Richard Simon v. State*, No. M2003-03008-CCA-R3-PC, 2005 WL 366893, at \*2 (Tenn. Crim. App. Feb. 16, 2005) (holding the defendant had no appeal as of right from an order denying sentencing credits); *Gary Maurice Sexton v. State*, No. E2003-00910-CCA-R3-PC, 2004 WL 50788, at \*3 (Tenn. Crim. App. Jan. 12, 2004) (holding a defendant did not have the right to appeal the denial of a motion for “credit for time at liberty”).

Neither Rule 3 nor the most recent amendment to Tenn. Code Ann. § 39-17-432(h) (2022) provides for an appeal as of right for the defendant. Therefore, we conclude that the defendant does not have an appeal as of right in this matter and that the instant appeal is not properly before us and should be dismissed.

### ***Conclusion***

Based on the foregoing authorities and reasoning, we conclude the defendant does not have an appeal as of right from the denial of his motion for resentencing under Tenn. Code Ann. § 39-17-432(h) and, therefore, dismiss the appeal.

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J. ROSS DYER, JUDGE